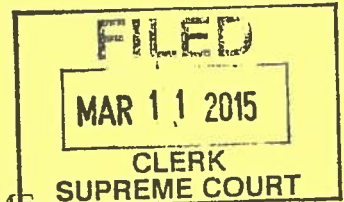


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
No. 2014-SC-000309-DE, NO. 2014-SC-000582  
COURT OF APPEALS FILE NO. 2012-CA-002210-ME  
HARDIN CIRCUIT COURT ACTION NO. 06-CI-01275



KEVIN ADDISON

APPELLANT/ CROSS APPELLEE

v.

LYDIA ADDISON

APPELLEE/ CROSS APPELLANT

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DISCRETIONARY REVIEW FROM COURT OF APPEALS  
FILE NO. 2012-CA-002210-ME

BRIEF OF THE APPELLANT/ CROSS APPELLEE

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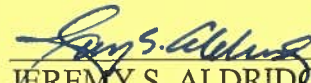
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CERTIFICATE OF SERVICE

Pursuant to CR 76.12, I hereby certify that a true copy of the foregoing was this 10 day of March, 2015 served in accordance with CR 5.02 and CR 5.03 by mail upon the following parties: Susan Clary, Clerk, Kentucky Supreme Court, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601, to Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229, Attorney for the Appellee, Allen McKee Dodd, at Dodd & Dodd Attorneys, PLLC, 2000 Waterfront Plaza, 325 West Main Street, Louisville, KY 40202 and, to the GAL for the children, Hon. LeeAnna Dowan-Hardy, and to Honorable Pamela K. Addington, Hardin Circuit Court Judge, both via Courthouse mail at the Hardin County Justice Center, 120 North Dixie Avenue, Elizabethtown, KY. I further certify that the record on appeal was not withdrawn from the Circuit Court by the undersigned, or the party on whose behalf this brief is filed.

  
JEREMY S. ALDRIDGE  
CAREY HENDRICKS ALDRIDGE

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## COUNTERSTATEMENT OF THE CASE

This matter arises of the Court of Appeals ruling from a decision of the Hardin Circuit Court to modify custody and the parenting time of the Appellee/Cross Appellant, Lydia Addison (hereinafter “Lydia”) upon motion of the Appellant/Cross-Appellee, Kevin Addison (hereinafter “Kevin”). R. 494-495 and 1041-1045. The trial court ruled in favor of Kevin, awarding him sole custody of the parties’ children and granting supervised visitation to Lydia after finding that Lydia had engaged in conduct that lead the children to believe they were sexually abused by Kevin when they were not. R. 1041-1045.

The parties were married in 1999 and divorce proceedings commenced in June 2006. R. 2-4. The Hardin Circuit Court entered a decree of dissolution on March 2, 2007. R. 36. Two children were born of the marriage, namely, S.A. (11 years of age) and M.A. (7 years of age). Consistent with the terms of the parties’ settlement agreement, Lydia was awarded sole custody of the parties’ children, with Kevin receiving reasonable parenting time pursuant to the agreement of the parties R. 20-21.

Prior to the decree of dissolution being entered, Lydia and the children relocated to Valparaiso, IN after Lydia met a man online. R. 68 and 1000. Kevin, who is employed by the Army Corp of Engineers, was deployed to Iraq for a period of six (6) months following the parties’ separation. R. 351. Despite the Appellant’s assertion that Kevin largely failed to take the opportunity to become involved in, and to be knowledgeable about his children’s lives, the record clearly indicates otherwise. Immediately following his return to the states, Kevin began having problems enforcing his visitation necessitating frequent Court intervention. *See record generally*. Less than a month after

the decree of dissolution was entered, Kevin was forced to file a motion seeking Court intervention and visitation with his children. R. 37-40. Lydia immediately counter filed a petition to domesticate the foreign order in the state of Indiana and sought to modify Kevin's visitation. R. 68-82.

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, and after a telephonic hearing with the Hon. James Johnson, who was the presiding judge over the case in Indiana, it was determined that Kentucky was the proper jurisdiction to hear the post-decree issues of the parties. R. 95, 97-98, 121-124.

Thereafter, the trial court frequently heard motions of the parties on various post-decree matters throughout the following months, to include matters involving Kevin's visitation. In the months and years following the entry of the decree of dissolution, it was necessary for the trial court to hear countless motions filed by Kevin to secure his previously ordered visitation. *See record generally*. In March 2009, Kevin moved the Hardin Circuit Court for a modification of custody, seeking to be named a joint custodian as he was having extreme difficulty in accessing information about the medical and educational needs of the parties' children and to incorporate a proposed parenting time calendar as the parties were again having difficulty reaching an agreement. R. 325-328. Lydia immediately filed a response, objecting to the modification and stated in her affidavit that she was cooperating fully with Kevin's visitation. R. 334. Remarkably, she failed to mention anything about potential sexual abuse allegations in her response despite later suggesting that she was aware of the allegations as early as 2007. Deposition of the Respondent Lydia Addison, December 3, 2010, Page 46, pg 45-47.

It was only after it became clear that the trial court would repeatedly enforce the order allowing Kevin to see the children (and that a show cause was issued for Lydia based on her failures to cooperate with Kevin's parenting time) that Lydia began making vague sexual abuse allegations with no credible evidence anything concerning had ever happened to the children. R. 377-412, R. 423.

In February 2010, it was necessary for Kevin to yet again file a motion to adopt a formal parenting time schedule. R. 373. The motion was remanded following representations by Lydia and opposing counsel that Kevin would receive parenting time on February 25, 2010. R. 406. However, the parenting time did not occur and vague allegations of child maltreatment began to surface. R. 394. Thereafter, Kevin filed a contempt motion - based upon the refusal of parenting time - and also renewed his motion for the adoption of proposed parenting time. R. 377, 409. A show cause was issued for Lydia as a result of her refusals to cooperate with Kevin's parenting time and a contempt hearing was set for April 6, 2010. R. 412. However, on March 19, 2010, at the presentation of the renewed motion for the adoption of the parenting time schedule, Lydia objected, bringing the vague sexual abuse allegations to the trial court's attention for the first time. R. 413. The motion was subsequently overruled based upon sexual abuse allegations. *Id.*

It was during this time that it was finally revealed to Kevin that the children were seeing a person purporting to be a therapist named Danielle Vance. R. 394. Later discovery would reveal that, in 2009, shortly after Kevin filed his motion to modify custody, the children began counseling at Family Focus and were assigned to a person named Danielle Vance. *Id.* Despite Ms. Vance being unlicensed, significantly lacking in

training, and being related to a close personal friend of Lydia's, Lydia allowed Ms. Vance to "treat" the children for an extended period of time. See Deposition of Danielle Vance, February 18, 2011, *generally*.

After the sexual abuse allegations were unsubstantiated following investigation by the Cabinet for Health and Family Services, Kevin moved to reinstate his parenting time, to make up dates in which he missed, and to outline a schedule for the remainder of the year. R. 414-418, 423. The trial court overruled the motion based upon an ex-parte letter purportedly tendered by Danielle Vance, though the letter was not on official letterhead and was unsigned. R. 426-428. Kevin then filed a motion requesting summer parenting time to be supervised by his spouse or by another appropriate caregiver. R. 429-433. Thereafter, the trial court receives yet another unsigned letter, again purported to be from Danielle Vance, voicing objections to Kevin receiving parenting time. R. 436-438.

On July 19, 2010, the Court entered an Order allowing Kevin to commence supervised parenting time. R. 442. Each party filed additional motions, which respect to modifying the dates and locations of the parenting times over the following months. *See record generally*.

On November 3, 2010, Kevin filed a motion for the Court to grant him unsupervised parenting time and the matter was set for a hearing for March 24, 2011. R. 461-475. Kevin also subsequently filed a motion to have an independent therapist evaluate the children, which was granted by the Court. R. 480-483, 491. However, the agreed upon therapist would not see the children because they were still being seen by Danielle Vance. Thereafter, Kevin filed a motion for the parties and children to be evaluated by Dr. Kelli Marvin, a forensic psychologist that the Hardin Circuit Court

utilizes frequently as an expert in child dependency, neglect and abuse cases, to give objective recommendations to the Court regarding Kevin's parenting time and access to the children. R. 494-497. The Court sustained the child access evaluation motion, ordering the parties to participate and for Kevin to pay all costs of the evaluation via Order entered on February 2, 2011. R. 496-497.

In July 2011, Kevin was forced to file a motion for make up parenting time as Lydia had once again failed to cooperate, in addition to a motion to compel Lydia to cooperate with Dr. Marvin. R. 498-505. Counsel for the parties were able to reach an agreement and an Agreed Order was entered by the trial court on July 27, 2011. R. 524.

Over the course of the next several months, each party filed a series of motions. Of significance was Lydia's motion for an additional thirty (30) days to submit information to Dr. Marvin and for an order to clarify Dr. Marvin's role. R. 567. The Court permitted Lydia to provide additional information and a hearing date was obtained for January 2012 to address Kevin's parenting time. Additionally, Dr. Marvin's report was submitted to the Court after its completion on January 8, 2012.<sup>1</sup>

Dr. Marvin's initial report to the trial court consisted of a Child Access Evaluation Conclusory Report, a Narrative Report of Kevin, a Narrative Report of Lydia, and a Sources of Information and Review of Records Report. Overall, the Report consisted of over seventy-five (75) pages. In her recommendations, Dr. Marvin recommended that Kevin get liberal and unsupervised access to the children. Child Access Evaluation, Conclusory Report, January 8, 2012, pg 26.<sup>2</sup> She further stated that regardless of whether Lydia encouraged or supported the generation of allegations of sexual abuse, she played

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<sup>1</sup> Dr. Marvin's report was tendered on January 8, 2012 but the report contains a clerical error and reflects the date of report as of January 8, 2011.

<sup>2</sup> Appendix 1 – Dr. Kelli Marvin, Child Access Evaluation, *Conclusory Report*, January 8, 2012.



an active role in denigrating Kevin in the children's eyes. *Id.* She further noted that behaviors and attitudes consistent with what is sometimes called "parental alienation" were deemed to have long been present on Lydia's behalf. *Id.* at 27. She noted that in instances in which behaviors and attitudes exist that are consistent with what is sometimes referred as parental alienation, then "a transfer of primary care and custody is typically recommended as this is viewed to be the only means by which to ensure cessation of denigrating behaviors and afford the target parent the time necessary to repair parent-child relationships". *Id.* She went on to note that, "In extreme cases, supervised contact with the denigrating parent is advised". *Id.* at 27.

The Appellant states in her Statement of the Case that the Conclusory Report stated that "the sole viable recommendation" was that the children remain in Lydia's care in Indiana. Appellant's Brief, page 5. However, the Appellant actually omits the bulk of the sentence and paragraph in an apparent attempt to mislead the Court. The report actually states in paragraph two (2) of the recommendations that

"Assuming that the petitioner does not seek a transfer of primary care and custody to his residence in Kentucky and/or the subject children remain in the primary care and custody of the respondent: The animus and geographical distance between the parties pose significant challenges. The petitioner and subject child require as much extended and uninterrupted time as possible if there is to be any hope of repair to the father-daughter relationships. As such, given the unique constellation of factors, the sole viable recommendation that the examiner can offer is a heavily modified version of what is sometimes referred to as the Ackerman Plan....",

Dr. Marvin then outlines the terms of those recommendations regarding Kevin's parenting times should he not seek a transfer of custody. Conclusory Report, pg 27.

She does not—anywhere—in her original report make a recommendation that the children remain in Lydia’s care as suggested by the Appellant in her brief. *Id.* In fact, Dr. Marvin indicates in her report in the very last paragraph, that

“should the Petitioner follow-through on his stated intention to file for primary care and custody of the subject children, and should the Court order a change in primary residence of the subject children, the examiner will gladly submit an addendum, at the request of the Court, addressing specific schedules of visitation for the Respondent.” *Id.* at 28.

Following the filing of Dr. Marvin’s report, Kevin moved the Court for an addendum to her report for Dr. Marvin to make custodial recommendations. R. 628-631. Kevin also filed a motion requesting the Court to modify custody wherein he was granted sole custody of the minor children and for supervised parenting time for Lydia. R. 632-642. Additionally, the Court awarded him unsupervised visitation based upon the report filed by Dr. Marvin. R. 643-645.

Dr. Marvin completed the addendum on February 2, 2012. In her addendum, Dr. Marvin recommended that Kevin be awarded primary residential care and custody of the children. Child Access Evaluation, Addendum: Conclusions & Recommendations, February 2, 2012, pg 4, paragraph 2.<sup>3</sup> The recommendation further suggested that the parent awarded care and custody of the children should also be awarded sole decision making power at it is clear that the parties cannot work cooperatively in the best interests of the children. *Id.* at 6, paragraph 4. As to recommendations concerning Lydia’s visitation, Dr. Marvin recommended that severing of contact is not recommended. *Id.* at 5. She further noted that supervised visitation should only be undertaken if Lydia is not amenable to therapeutic interventions and there are clear/objective indications that she is

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<sup>3</sup> Appendix 2 – Dr. Kelli Marvin, Child Access Evaluation, *Addendum: Conclusions & Recommendations*, February 2, 2012.

attempting to undermine the stability of the subject children's residential/custodial transfer. *Id.* at 6.

Following the addendum being filed with the Court, and subsequent to Kevin paying for the two reports by Dr. Marvin out of Louisville, Kentucky, Lydia filed a motion to transfer jurisdiction for the first time since 2007. R. 648-688. The motion was overruled and a hearing on the modification of custody was set for March 30, 2012. R. 688. Thereafter, Lydia filed a motion to continue the hearing and renewed her motion to transfer jurisdiction. R. 719. On March 1, 2012, the Court entered an Order continuing the trial and overruling Lydia's motion to transfer jurisdiction. R. 742-743. A court date was set for August 16, 2012 for a six-hour hearing. *Id.*

During the several months between leading up to the final hearing, both parties filed various motions. Kevin filed a motion, which was ultimately granted, prohibiting Lydia from scheduling counseling/therapy sessions without written permission agreement. R. 746-747. Lydia filed a motion requesting a Guardian Ad Litem for the children. R. 781. Said motion was granted over the objection of Kevin. R. 842. Additionally, Lydia requested to have a custodial evaluation done by Dr. Zamanian and requested the Court to require Kevin's participation. R.774-830. Kevin, citing the numerous continuances, and costs associated with same, objected. *Id.* The court denied Lydia's request. R. 830.

The hearing was heard on August 16, 2012. After hearing the testimony, the Court orally ordered custody to be transferred to Kevin with Lydia to receive supervised parenting time. R. 943. Lydia filed a motion to unsupervise the visitation and to supplement the record on September 5, 2012. R. 948-962. The Court never specifically

entered orders regarding the motion, but orally overruled the motions. Each party submitted trial memorandums. R. 977-988, 1040. The Guardian Ad Litem submitted her report. R. 963-967. The Court entered its Findings of Facts, Conclusions of Law, and Judgment on October 26, 2012. R. 1041-1045.

Lydia filed a motion to alter, amend or vacate the Judgment as well as a motion for additional findings of fact. R. 1046-1086. The Court entered an Order on November 28, 2012 overruling Lydia's motion for unsupervised visitation, but said Order was silent as it pertained to Lydia's motion to alter, amend or vacate and motion for additional findings. R. 1087. The appeal to the Court of Appeals followed.

The Court of Appeals subsequently issued numerous orders pertaining to the case and ultimately ordered the trial court to rule upon Lydia's motions to alter, amend or vacate and for additional findings of fact. The trial court subsequently filed a twenty-eight (28) page order addressing this Court's ruling.<sup>4</sup> *Amended and Supplemental Findings of Fact, Conclusions of Law, Decree and Order*, June 21, 2013.

The Court of Appeals issued its decision on May 16, 2014 reversing and remanding the decision of the trial court concluding that the trial court improperly placed a time restriction on the hearing without considering the admissibility or exclusion of the evidence pursuant to the Kentucky Rules of Evidence (KRE), and thereby denied the opportunity to offer testimony. Kevin timely filed a motion for discretionary review, which was granted by the Court. Lydia subsequently filed a cross-motion for discretionary review, which was also granted.

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<sup>4</sup> Appendix 3 – *Amended and Supplemental Findings of Fact, Conclusions of Law, Decree and Order*, June 21, 2013.

## ARGUMENT

**I. The trial court properly retained jurisdiction over this case under its exclusive, continuing jurisdiction over these child custody proceedings.**

The trial court did not err in its order denying Respondent's Motion to Transfer Continuing and Exclusive Jurisdiction to Indiana. Under Kentucky law, "[w]hether a trial court acts within its jurisdiction is a question of law; therefore, our review is *de novo*." *Biggs v. Biggs*, 301 S.W.3d 32,33., citing *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. Ct. App. 2004).

As noted previously, Lydia first attempted to transfer these matters to Indiana in April 2007 by initiating an action in Porter County, IN and filing a motion requesting the Porter Superior Court to accept jurisdiction of these matters. R. 64. Following a telephonic hearing with the Hon. James Johnson on May 22, 2007, the Porter Superior Court and the Hardin Circuit Court agreed Hardin Circuit Court properly had continuing, exclusive jurisdiction over the matters and was willing to continue to exercise same. Thus, it was decided that Hardin Circuit Court would retain jurisdiction. R. 94-95, 97-98, 121-124. *See also*, Amended Findings, *supra* at page 6-7. Thereafter, Lydia availed herself of the Hardin Circuit Court frequently, receiving numerous favorable rulings, and only sought to transfer jurisdiction to Indiana again after Dr. Marvin's report (which was more than critical of Lydia's behavior) was tendered.

**A. The trial court properly exercised jurisdiction over this case, because both parties and the children had a "significant connection" to Kentucky at the time Ms. Addison filed her motion to transfer.**

Lydia has made the argument that because neither Lydia nor the children continued to have a "significant connection" with Kentucky at the time of Lydia's most

recent motion to transfer was filed, the trial court erred in exercising exclusive, continuing jurisdiction over this case. This argument refers to the first prong of Kentucky's exclusive, continuing jurisdiction over matters of child custody. For the reasons described below, the Lydia's argument must fail.

KRS § 403.824(1)(a) states:

(1) Except as otherwise provided in KRS 403.828, a court of this state which has made a child custody determination consistent with KRS 403.822 or 403.826 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

KY. REV. STAT. ANN. § 403.824 (West 2004).

It is only necessary that the children, or the children and one (1) parent have a significant connection with this state, not that the children's mother, Lydia, specifically has a significant connection with this state. Therefore, the Lydia's argument that the trial court erred in retaining jurisdiction due to Lydia's lack of a significant connection with Kentucky is without statutory basis, as Kevin and the children had a significant connection with Kentucky.

According to Kentucky law,

[T]he state having original jurisdiction over custody maintains exclusive continuing jurisdiction though the child has acquired a new home state if the general requirement of the substantial connection jurisdictional provisions are met. As stated by the court in *Ruth v. Ruth*, 32 Kan.App.2d 416, 421, 83 P.3d 1248, 1254 (2004), exclusive, continuing jurisdiction prevails under the UCCJEA until the "relationship between the child and the person remaining in the state with exclusive, continuing jurisdiction becomes so attenuated that a court could no longer find significant connections and substantial evidence.

*Williams v. Frymire*, 377 S.W.3d 579, 588 (Ky. Ct. App. 2012) (quoting *Ruth v. Ruth*, 32

Kan. App. 2d 416, 421, 83 P.3d 1248, 1254 (Kan. Ct. App. 2004)).

Additionally, "...it is not necessary for a child to reside in the Commonwealth in order for Kentucky to retain jurisdiction." *Biggs v. Biggs*, 301 S.W.3d 32, 34, (Ky. Ct. App. 2009) (citing *Goff v. Goff*, 172 S.W.3d 352, 358 (Ky. 2005)). Instead, the *Biggs* court considered one parent exercising parenting time in the Commonwealth sufficient to establish a "significant connection" with Kentucky for exclusive, continuing jurisdiction. *Id.* The *Williams* court also determined that the minor child who was the subject of that case maintained a significant connection with Kentucky through parenting time with her natural father and his family members in the Commonwealth. *Williams*, 377 S.W.3d at 588.

At all times during these proceedings, Kevin has been a resident of the state of Kentucky. *See record generally*. Further, during the pendency of these proceedings, Kevin has continuously exercised parenting time with the minor children in the state of Kentucky. *Id.* Kevin also has a child with his current wife, Leslie Addison ("Leslie"), and the minor children who are the subject of this action have visited with their half-sibling in the state of Kentucky since the birth of the child.<sup>5</sup> *Id.*

It is clear, based on Kentucky law, that Kevin and the children have a significant connection with this state to satisfy the jurisdictional requirement of KRS § 403.824 (1)(a).

The Lydia has drawn an analogy between the requirement of a "significant connection" for purposes of exclusive, continuing jurisdiction of the state of Kentucky over child custody proceedings to "minimum contacts" as used in *International Shoe Co.*

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<sup>5</sup> Kevin and Leslie have subsequently had another biological child since the initiation of this appeal so the children now have two (2) half-siblings residing in Kevin's home.

*v. Washington*, 326 U.S. 310, 316 (1945); and *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). However, the “minimum contacts” requirement of *International Shoe* and its progeny refers to personal jurisdiction, when the issue on this appeal specifically refers to subject matter jurisdiction, not personal jurisdiction, as both parties have willingly availed themselves to the Hardin Circuit Court. Kentucky law is clear on this matter, as the “significant connection” language at issue is derived from KRS § 403.824, which states, in relevant part: “.... a court of this state which has made a child custody determination consistent with KRS 403.822 or 403.826 has exclusive, continuing **jurisdiction over the determination** until...” KY. REV. STAT. ANN. § 403.824(1) (West 2004) (emphasis added). The jurisdiction at issue in this appeal is over the subject matter of child custody modification, not personal jurisdiction over the parties. Therefore, the argument by the Appellant that “significant connection” should be a standard somewhere between minimum and systematic contacts fails.

B. The trial court properly exercised jurisdiction over this case, because substantial evidence is available in this state concerning the children’s care, protection, training and personal relationships.

The second prong of KRS § 403.824(1)(a) states that this state has continuing jurisdiction over a child custody determination until “substantial evidence is no longer available in this state concerning the child’s care, protection, training, and personal relationships...” KY. REV. STAT. ANN. § 403.824(1)(a) (West 2004). There is substantial evidence in Kentucky related to the children’s care, protection, training and personal relationships, which was presented through Kevin and Dr. Marvin. Lydia makes reference to witnesses not called at the hearing on the merits, and such evidence should be excluded from consideration for purposes of this appeal as it is not part of the record and is purely



speculative in nature.

The *Williams* court found that substantial evidence was found in Kentucky regarding the minor child who was the subject of that action's care, protection, training, and personal relationships through her natural father's family and daycare provider while she was with her natural father. *Williams*, 377 S.W.3d 579, 588. The evidence in this case, which was presented through Kevin and Dr. Marvin, shows that the children had substantial and continuing visits to the state of Kentucky for parenting time with their father, Kevin. Final Hearing Tape, August 16, 2012, *generally*. The evidence supports a finding that during their visits to Kentucky, the children were also cared for and protected by Leslie, and formed a personal relationship with her. *Id.* The children also had a personal relationship with their half-sibling during these proceedings. *Id.* In addition, Dr. Marvin testified regarding the children's personal relationships with Kevin and their family in Kentucky. *Id.* Concluding, it is clear based on evidence that the jurisdictional burden of "substantial evidence" regarding the children's "care, protection, training, and personal relationships" in Kentucky is met.

Most importantly, the primary witness associated with this case is a resident of Kentucky in Dr. Marvin. As previously noted, Lydia did not file a motion to transfer this case until after the report of Dr. Marvin was filed and she was aware that the report indicated that Lydia played a major role in the children falsely believing they were abused by Kevin. She was also aware of the recommendations to modify custody. It was not until that time did she want to change jurisdiction.

The Court of Appeals agreed stating that "we believe that this issue should have been raised years ago after the initial jurisdictional determination by the Hardin Court, as

opposed to Lydia waiting years to bring this matter before the Court when it appeared that the court would change the custody determination.” See Court of Appeals Opinion, page 13-14. Lydia did not object in bringing her issues before the Hardin Family Court, and in fact, initiated the most recent litigation with the allegations of sexual abuse with the Hardin Family Court; it was only it was apparent she may not get the result she had hoped that she raised jurisdictional grounds. As such, considering the familiarity the trial court had with the parties, it was not an error to continue hearing the matter.

C. The trial court properly exercised jurisdiction over this case, because Kentucky is not an inconvenient forum.

“Our Supreme Court has recently held that a new state may not exercise jurisdiction for purposes of custody unless a Kentucky court first determines that a new state would be a more convenient forum according to the factors listed in KRS 403.834.” *Biggs*, 301 S.W.3d 32, 34, citing *Mauldin v. Bearden*, 293 S.W.3d 392, 401 (Ky. 2009). Lydia makes a two-prong argument as to why the trial court allegedly erred when making a determination to retain the case and not transfer it to Indiana based on Kentucky being an inconvenient forum to adjudicate custody pursuant to KRS § 403.834. For the reasons stated below, Lydia’s argument that the trial court erred when it retained the case instead of transferring it to Indiana must fail.

As previously noted, in 2007, both the Porter Superior Court and the Hardin Circuit discussed the relevant factors related to jurisdiction and ultimately decided that the Hardin Circuit Court should retain it’s exclusive, continuing jurisdiction. R. 94-95, 97-98, 121-124. Thus, the entirety of these proceedings has taken place in Kentucky. Therefore, the final prong of consideration under KRS § 403.834(2) is clearly in favor of

the Hardin Circuit Court retaining jurisdiction, and the most controlling factor. This is especially true when considering the depth and duration of this action.

The other factors outlined in KRS 403.834(2) are in dispute, although it should be noted that this is not an exhaustive list. While it is true that the children had lived in Porter County, Indiana, for five (5) years at the time of the final hearing, they had also spent ample time in Kentucky for parenting time with Kevin. Further, the distance between Valparaiso, Indiana, and Hardin County, Kentucky, is approximately three hundred miles (300), which is easily within driving distance. Likewise, Lydia states that her income for 2011 was \$17,692, and states that due to her income compared to Kevin's income, she should not have been made to bear the cost of litigation and travel to Kentucky. There was no evidence on the record to support a finding that the cost of litigation would have been any less in the state of Indiana compared to Kentucky. There is also no evidence to support a finding that Lydia had been required to incur substantial costs that Kevin did not have to bear, as she alleged. To the contrary, Kevin was required to bear the full costs of the evaluations by Dr. Marvin. Because there is no evidence in the record to support such statements, these allegations should be excluded from consideration. Again, Lydia willingly used the Hardin Circuit Court to litigate this action for several years before deciding it was suddenly an inconvenient forum.

Lydia also alleges that evidence regarding the children's protection, training, personal relationships, and best interests were in Indiana. There is no proof of this allegation in the record. Lydia had the same opportunity as the Kevin during the hearing on the merits to call witnesses, and cannot imply testimony from witnesses that were not called at the trial during these appellate proceedings. Importantly, the trial court

permitted telephonic testimony for out-of-state witnesses, so there is no indication that this factor supports a finding that it was appropriate for Indiana courts to exercise jurisdiction.

“[T]he test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004). When considering the longevity of these proceedings in Hardin County court, and the willingness of both parties to avail themselves to the state of Kentucky for litigation on these issues until late in these proceedings, it is apparent that the trial judge did not abuse her discretion when she failed to determine that Kentucky is an inconvenient forum under the circumstances.

Finally, and most critical, Lydia did not assert that Hardin County was inconvenient until she saw the writing on the wall in the form of Dr. Marvin’s report. She was well aware that the recommendation would be unfavorable to her and it was at that stage she looked for a way out. However, by the time she filed the motion, Hardin County had heard all portions of the proceedings leading up to the determinative hearing date. It had ordered the parties to undergo evaluations by a Kentucky resident evaluator. Kevin had expended thousands of dollars in fees associated with the evaluation. The evaluator was the key witness to the entire case.

Based on the cumulative evidence and consideration of the factors listed in KRS § 403.834, there is no evidence to support a conclusion that the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Concluding, the trial court properly declined to relinquish jurisdiction based on KRS § 403.834.

**II. The trial court should be upheld because modification of custody and parenting time is in the best interests of both children.**

When the Court of Appeals reviews the decision of a trial court in a child custody case, the test is whether the findings of the trial court are clearly erroneous or that it abused its discretion. *Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence. *Id.* Further, due regard is to be given to the trial court in determining the credibility of witnesses. *Id.* In the matter *sub judice*, the trial Court issued Amended and Supplemental Findings of Fact on June 21, 2013. The testimony at trial, and the reports of both Dr. Marvin and Dr. Zamanian support the Court's findings.

Dr. Marvin's first recommendation is that the children should not be separated and should continue to reside together regardless of which parent is ultimately awarded primary care and custody. Addendum Report, *supra*, at 2. She further recommends that it is in the best interest of M.A. for Kevin to be the primary residential custodian. *Id.* With respect to S.A., Dr. Marvin opines that the best interest of S.A. is unclear. *Id.* at 3. However, the sole issue regarding S.A. is her hatred of Kevin. The relationship and feelings S.A. has towards Kevin is clearly based upon the actions of Lydia. Dr. Marvin suggests this in her original report wherein she states "she has played a very active role in denigrating the petitioner in the subject children's eyes." Conclusory Report, *supra* at 26.

It appears that the Lydia concedes that it is the best interest of M.A. that Kevin be granted sole custody as she primarily argues that the court did not consider the two children's best interest separately. *See* Appellee/Cross Appellant's Brief, pages 31-33. Regardless, the Court's findings concerning M.A. are clearly supported by the weight of the evidence and therefore, should not be disturbed.

As it pertains to S.A., the Court concludes in the Amended and Supplemental Findings of Fact that it is in the best interest of S.A. that Kevin be granted sole custody. The Court listed all the factors of KRS 403.340 and KRS 403.270. Contrary to the Appellant's assertion that the Court did not consider whether the harm likely to be caused by a change of environment is outweighed by its advantage to the child pursuant to KRS 403.340(3)(e), the Court states that "the evidence clearly shows that if the children are left in the sole custody of the Respondent that environment would seriously endanger their physical, mental, moral or emotion health, in fact, the evidence clearly indicates that these children have already been emotionally and mentally injured by the unreasonable conduct of the Respondent." *See* Amended and Supplemental Findings of Fact, Conclusions of Law, Decree and Order, page 25. The Court further states "clearly, there is sufficient evidence to indicate that any harm that is likely to be caused by a change of custody is far outweighed by the advantages." *Id.*

The Court cites a litany of facts raising questions of Lydia's psychological and emotional issues, inconsistencies in her statements to both Dr. Marvin and Dr. Zamanian when compared with the records of the children, and the emotional harm she has placed upon both children. Both of Dr. Marvin's reports cite instances of Lydia's attempts at denigrating Kevin in the eyes of both children and makes recommendations supporting the Court's findings. Dr. Marvin's testimony was consistent with her reports and recommendations to the Court. Put simply, the Court's findings as it pertains to awarding Kevin sole custody of both children are supported by the weight of the evidence and therefore are not clearly erroneous. Hence, this Court should not disturb the findings of the fact of the trial court.

**III. The trial court's decision to supervise the Appellant's parenting time should be upheld, as the record supports a finding that unsupervised parenting time would seriously endanger the children's physical, mental, moral, and emotional health.**

According to Kentucky law:

A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation....

KY. REV. STAT. ANN. § 403.320(1) (West 1992).

Subsequent to the initiation of this appeal, and the filing of the Appellant's brief the trial court has granted Lydia reasonable parenting time. Specifically, Lydia receives unsupervised parenting time, the times of which are outlined in the Hardin Circuit Parenting Guidelines, adopted by the Kentucky Supreme Court. Therefore, this particular issue is moot.

Notwithstanding, the Court's initial finding to supervise Lydia's visitation was supported by the record. Dr. Marvin's initial report states that in extreme cases of parental alienation, which she finds to have long been present in this case, supervised contact with the denigrating parent is advised owing to concerns that the denigrating parent may undermine the development of positive relationships between the target parent and the children. Conclusory Report, *supra* at 27. In her addendum, she states that the implementation of supervised visitation should only be undertaken if the Respondent is not amenable to therapeutic interventions. Addendum Report, *supra* at 6.

The Court clearly had these concerns. The Court notes, "the mental health of the Respondent has put into jeopardy the mental and emotional health of the children." *See* Amended and Supplemental Findings, *supra* at 25. The Respondent was not candid in

her interviews with Dr. Marvin or Dr. Zamanian, nor was she candid with the Court. *Id.* There was legitimate concern that if granted unsupervised contact with the children during the initial transfer of physical custody, that the Respondent would sabotage any attempt at the children developing a normal relationship with their father. Therefore, the Court's findings were supported by the evidence and not clearly erroneous.

**IV. The trial court properly ruled from the bench that each party is responsible for their own attorney's fees.**

According to Kentucky law, it is a well-known concept that the trial court has great discretionary power in its determination to award or deny attorney fees. No authority exists requiring a trial court must make specific findings on the parties' financial resources. The obligation of the trial court is to "consider the financial resources of the parties in ordering a party to pay a reasonable amount in attorney fees." *Hollingsworth v. Hollingsworth*, 798 S.W.2d 145, 147-148 (Ky. Ct. App. 1990) (quoting *Poe v. Poe*, 711 S.W.2d 849, 852 (Ky. Ct. App. 1986)). The trial court was correct in ruling that Lydia should not receive an award of attorney's fees from this action, as it was her actions that necessitated these proceedings. But for her own conduct and her repeated history of conduct intended to denigrate Kevin, the entire issue underlying this case would not have been present. As the Court noted, she was not candid with the Court when she stated she had acted in reliance upon the opinions of professionals when she is the individual that supplied the histories to the various counselors. *See Amended Findings, supra* at 25. It was her mental health that put into jeopardy the mental and emotional health of the children. *Id.* It would be wholly inequitable to require Kevin to bear the financial of burden of Lydia's attorney fees when it was her conduct that caused the entire litigation.



Furthermore, Lydia filed countless motions with the court, which dramatically increased the cost of this litigation. It was also at her request that additional exhibits were required to supplement Dr. Marvin's report, including an additional evaluation of Kevin. It is not equitable to require Mr. Addison to fund Lydia's tireless efforts to withhold the parties' minor children from having a normal relationship with their father. Therefore, the trial court was correct in ruling that the Lydia be required to pay her own attorney's fees for these proceedings.

**V. The trial court did not error in failing to order Kevin to participate in a mental health evaluation with Dr. Zamanian.**

Lydia requested that Kevin participate in a custodial evaluation following Dr. Marvin's report and not a mental health evaluation as indicated by Lydia in her brief. R. 774-780. The assertion that she requested any type of evaluation pursuant to CR 35.01 is not only misleading but a blatant mistruth. She simply cited CR 35.01 in her motion for a second custodial evaluation but never, in any way, asserted that Kevin's mental health was ever in controversy to invoke CR 35.01. Instead, Lydia simply requested a second custodial evaluation insisting that Kevin had permitted to have one by his expert. She has repeatedly incorrectly deemed Dr. Marvin as Kevin's expert, when in fact, Dr. Marvin and the Court perceived her role as the Court's expert and conducted her interviews, recommendations and conclusions as the expert of the Court. Dr. Marvin was required to delay making recommendations by the Court when requested by Lydia for additional time to provide information. As such, the notion that Kevin was given preferential treatment because "his" expert was permitted access to both parties, and the children, is simply incorrect.

Lydia did not request Kevin to participate with the interviews of Dr. Zamanian until June, 2012. At that time, the final hearing was set for August 18, 2012. The original hearing date of March 31, 2012 was continued at the request of Lydia. As argued to the trial court, the custodial evaluation was a blatant attempt at delaying the proceedings further in hopes of having a second custodial evaluation reach a different conclusion. As such, the trial court did not error in not requiring Kevin to participate.

The Court of Appeals agreed. The opinion states “Lydia requested Kevin participate in a custodial evaluation following Dr. Marvin’s report and cited to CR 35.01 in the motion but never asserted that Kevin’s mental health was in controversy.” See Court of Appeals Opinion, page 23. An Order pursuant to CR 35.01 requires the order may be made only on motion for good cause shown. This Court addressed 35.01 in *Taylor v. Morris*, 62 S.W.3d 377 (Ky,2001) and held that the good cause requirement is not shown by mere conclusory allegations of pleadings. *Taylor* at 379. In the matter *sub judice*, Lydia never establishes Kevin’s mental health was in controversy as required. Accordingly, the Court of Appeals did not find an error in the trial court’s ruling.

### **CONCLUSION**

The Appellant/Cross Appellee respectfully requests that this court affirm the entire Findings of Facts, Conclusions of Law, and Decree entered by the trial Court.

RESPECTFULLY SUBMITTED,



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